No. 76-456

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHAEL O'LOONEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1976. The petition for a writ of certiorari was filed on September 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a statement made by petitioner and petitioner's consent to the search of his house were the product of an illegal detention.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner

was convicted of having conspired to export firearms, in violation of 18 U.S.C. 371 and 22 U.S.C. 1934.[1] He was fined $5,000 and placed on three years' probation.[2] The court of appeals affirmed (Pet. App.).

The evidence at trial, as summarized by the court of appeals (Pet. App. A3-A10), showed that petitioner and Shannon Harper had conspired to purchase firearms in the United States and illegally to export them to Ireland for use by the Irish Republican Army.[3] Petitioner supplied the money for the purchases and Harper, at times using false identification, purchased the weapons. On one such occasion, April 25, 1974, Harper's behavior aroused the suspicion of the store owner. After initially entering the store, Harper left and was seen talking to petitioner; he then reentered the store and placed a cash deposit on a semi-automatic rifle, using identification containing an address the store owner believed to be fictitious. The owner sent a letter to Harper at that address; it was returned marked "no such address".

When Harper returned a week later to pick up the rifle he had ordered, the store owner called the police. One of the officers who responded to the store owner's call questioned Harper and quickly determined that he had used false identification in attempting to make the purchase A neighbor of the store owner informed a second

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[1]Petitioner was acquitted on four counts charging him with having aided and abetted the making of false statements in connection with the purchase of firearms, in violation of 18 U.S.C. 2 and 924(a) (Pet. App. A2).

[2]Petitioner incorrectly states (Pet. 6) that he was placed on probation for five years.

[3]Harper was indicted with petitioner but pleaded guilty prior to petitioner's trial (Pet. App. A2).

officer that petitioner, who was walking on the sidewalk outside the store, appeared to be involved in the matter being investigated. The officer, Catherine Nance, therefore asked petitioner for identification and whether he knew the man in the gun store. Petitioner replied that he did not. Petitioner also told Officer Nance that he had a car a few blocks away and he agreed to permit her to search the car. Officer Nance then drove petitioner to the car and, after having obtained petitioner's written consent, searched the car. The search yielded a clothes bag that belonged to Harper.

The officers then took petitioner to the police station where, after having been given *Miranda* warnings, he again denied knowing Harper. Because the police had reason to believe petitioner and Harper had been attempting an unlawful purchase of a firearm, they called federal Alcohol, Tobacco and Firearms agents. The agents arrived approximately an hour later and again gave petitioner *Miranda* warnings. After brief questioning, petitioner signed a statement conceding that he and Harper had decided to obtain guns for Ireland. He also agreed to a search of his house, in the course of which the agents found two weapons that had been purchased previously by Harper.

ARGUMENT

Petitioner concedes (Pet. 11) that his original detention on the street for questioning was lawful. He argues, however, that his subsequent detention at the police station, during which he made an inculpatory statement and consented to the search of his house, was illegal because it was "solely for the purpose of 'investigation,' [and] without probable cause" (Pet. 17). The court of appeals correctly concluded, however, that although the police did not formally arrest petitioner prior

to the time he gave a statement and consented to the search of his house, they had probable cause to do so and that the detention was therefore lawful. The court of appeals also correctly concluded that, even assuming the officers lacked probable cause to arrest petitioner, his statement and consent were voluntary and were not tainted by the illegality of his detention.

a. Petitioner does not seriously dispute the voluntariness of his consent to the search of his car. In any event, as the court of appeals noted (Pet. App. A5-A6):

> [Petitioner] agreed to take the police to his car after only a few minutes of questioning on a public sidewalk. There were no drawn weapons, no evidence of handcuffs, no overt force and no threats. The trial judge found that the policewoman who obtained [petitioner's] consent was not "an overpowering woman and would [not] have scared [petitioner] into doing anything he didn't voluntarily want to do." [Petitioner] makes much of the fact that he was locked in the back of the police car for the short ride from the gun store to the car and during the search. He agreed to ride in the police car, however, while standing on the sidewalk. He was also out of the car and on the sidewalk when he agreed to the search. * * *
>
> We conclude from the totality of the circumstances that the trial court's finding of voluntary consent is not clearly erroneous. In fact, it appears that [petitioner] freely consented to the search in a voluntary effort to allay police suspicion. Indeed, [petitioner's] attorney argued to the jury that [petitioner] "freely and fully signed a consent, and permitted them to search his car."

As noted, even before the search of petitioner's car, the police officers had determined that Harper had

attempted to purchase a firearm with false identification. As a result of the search, they obtained evidence connecting petitioner and Harper and learned that petitioner had lied about knowing Harper. See *United States* v. *Gomori*, 437 F. 2d 312, 314 (C.A. 4). The officers therefore had probable cause to arrest petitioner at that time (see Pet. App. A7-A8). Thus, petitioner's contention that his subsequent statement and consent to the search of his house were the product of an illegal detention is without merit. See *Brown* v. *Illinois*, 422 U.S. 590.

b. Even if petitioner's detention at the police station was without probable cause, *Brown* v. *Illinois, supra,* does not require suppression of his statement and the evidence discovered during the search of his house. As the court of appeals noted (Pet. App. A8), this Court did not establish in *Brown* a *per se* rule that any statement made following an illegal arrest is tainted. Rather, *Brown* reaffirmed the holding of *Wong Sun* v. *United States*, 371 U.S. 471, that such a statement is admissible if it is "sufficiently an act of free will to purge the primary taint" (422 U.S. at 602), the Court noting that this question "must be answered on the facts of each case" (*id.* at 603). The Court also emphasized in *Brown* that, in determining whether the primary taint has been purged, courts should consider whether *Miranda* warnings were given, the temporal proximity of the arrest and statement, the existence of intervening circumstances and, particularly, the flagrancy of the official misconduct (*id.* at 603-604).

Applying these factors to the present case, the court of appeals concluded that (Pet. App. A8-A9)—

> [petitioner's] statement is not tainted by the seizure of his person, even if we assume it was illegally accomplished. The Supreme Court in *Brown* placed the greatest emphasis on the flagrancy of the

> Fourth Amendment violation. There, the police broke into and searched the defendant's apartment without a warrant. Upon the defendant's return home, he was arrested at gunpoint, also without a warrant. The police had no more basis for these acts than that the defendant was an acquaintance of a murder victim. * * * Here, at the very least, the police had a well-founded reasonable suspicion approaching probable cause to believe that [petitioner] had committed a crime. There were neither drawn guns nor police actions calculated to cause surprise, fear and confusion. The detention was no more extensive than reasonably necessary to facilitate a brief inquiry into an apparent crime. Thus we need not be concerned with deterring purposefully illegal arrests for investigatory or other improper motives. * * *

In contrast to the facts presented in *Brown*, the court further noted (Pet. App. A9-A10 (footnotes omitted)):

> [T]he detention of [petitioner] was at worst a minor violation of the Fourth Amendment. It was relatively nonintrusive on his personal privacy. He was originally detained on a public sidewalk and he voluntarily cooperated with officers in an effort to allay police suspicion, unlike the forcible seizure of Brown by surprise at his home. Where the Fourth Amendment violation is less flagrant, a lesser showing is required to purge the later statement of taint. Here we hold that [petitioner's] statement following the giving of *Miranda* warnings several hours after the initial detention was sufficiently an act of free will outside the causal chain of the alleged illegal detention. To hold otherwise would be to

> **invoke the Fourth Amendment exclusionary rule for a de minimis deterrent effect on errant police behavior, at a great cost to the legitimate demands of law enforcement. * * * [4]**

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[4]Since, as the court of appeals found (Pet. App. A9), petitioner's detention was not for improper motives and was "no more extensive than reasonably necessary to facilitate a brief inquiry into an apparent crime," petitioner's reliance upon *Mallory* v. *United States*, 354 U.S. 449, is misplaced. In *Mallory*, decided before *Miranda* v. *Arizona*, 384 U.S. 436, this Court condemned the practice of "arrest[s], as it were, at large" (354 U.S. at 456) for purposes of investigation or interrogation and admonished that "the delay [in presenting an accused before a magistrate] must not be of a nature to give opportunity for the extraction of a confession" (*id.* at 455). The Court thus erected a barrier against lengthy police interrogation designed to wear down a suspect's resistance; it required prompt arraignment to provide a break in the interrogation and to ensure that the accused was advised of his rights. Here, however, petitioner was advised on two occasions in accordance with *Miranda* and he was not subjected to continuous or psychologically coercive interrogation. As the court of appeals noted (Pet. App. A10 n. 2), after brief initial questioning petitioner was left alone in the interrogation room (where he was free to call an attorney) until the arrival of federal agents; and "as soon as the [federal] agents arrived, he discussed [the purchase of the rifle] openly and in some detail."

The lower court decisions relied upon by petitioner are pre-*Miranda*, and reflect *Mallory's* emphasis upon the role of the magistrate in providing advice to the accused of his constitutional rights. *E.g.*, *Greenwell* v. *United States* 336 F. 2d 962, 966 (C.A. D.C.). As the District of Columbia Circuit has recognized, "[a] valid *Miranda* waiver is necessarily, for the duration of the waiver, also a waiver of an immediate *judicial* warning of constitutional rights." *Frazier* v. *United States*, 419 F. 2d 1161, 1166 (emphasis in original). See also 18 U.S.C. 3501.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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